

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHERINE V. SIKORSKI and JOHN SIKORSKI, : 07 – CIV – 3906 (CLB) (LMS)

Plaintiffs, :

-against- : **NOTICE OF MOTION
TO DISMISS COMPLAINT**

FULTON CHEVROLET-CADILLAC CO, INC., :
FULTON CHEVROLET CO., INC., HIGH POINT :
CHEVROLET, INC., FULTON/HIGH POINT :
CHEVROLET GROUP HEALTH BENEFIT PROGRAM, :
SIEBA, LTD., AVEMCO INSURANCE COMPANY and :
AVEMCO INSURANCE AGENCY, INC., :

Defendants.

PLEASE TAKE NOTICE, that upon the complaint and accompanying affidavits, exhibits and memorandum of law, and all of the pleadings and proceedings heretofore had herein, defendants Avemco Insurance Company and Avemco Insurance Agency, Inc. (together, “Avemco”) will move this Court, before the HONORABLE CHARLES L. BRIEANT, United States District Judge, on July 20, 2007, at 10 a.m., for an order which:

(a) dismisses the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the following grounds:

(i) with respect to Count 4, the ERISA claim, on the ground the moving defendants are not proper defendants;

(ii) with respect to Counts 2 and 3, the state law claims, on the ground plaintiffs are not third-party beneficiaries under the insurance policy at issue, and such claims are pre-empted by ERISA;

(iii) with respect to all claims, on the ground the claims are time barred by reason of a 2 year limitation provision in the policy;

(iv) with respect to all claims, on the ground the policy, by its express terms, does not cover the subject claim;

(iv) with respect to the claims against Avemco Insurance Agency, on the ground the agent is not a party to the policy and acted on behalf of a disclosed principal;

(b) grants Avemco contractual indemnification pursuant to the insurance policy against co-defendants Fulton Chevrolet-Cadillac Co., Inc.. Fulton Chevrolet Co., Inc. and High Point Chevrolet, Inc.; and

(c) grants such other and further relief as the Court may deem just.

Dated: New York, New York
July 9, 2007

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

Steven Kent (SK-7209)

Attorneys for Defendants

AVEMCO INSURANCE COMPANY and

AVEMCO INSURANCE AGENCY, INC

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File No. 06951.00024

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHERINE V. SIKORSKI and JOHN SIKORSKI, : 07 – CIV – 3906 (CLB) (LMS)

Plaintiffs, :

-against-

FULTON CHEVROLET-CADILLAC CO, INC., : **AFFIDAVIT OF STEVEN**
FULTON CHEVROLET CO., INC., HIGH POINT : **KENT SUBMITTED IN**
CHEVROLET, INC., FULTON/HIGH POINT : **SUPPORT OF THE MOTION**
CHEVROLET GROUP HEALTH BENEFIT PROGRAM, : **TO DISMISS OF**
SIEBA, LTD., AVEMCO INSURANCE COMPANY and : **DEFENDANTS AVEMCO**
AVEMCO INSURANCE AGENCY, INC., : **INSURANCE COMPANY**
: **AND AVEMCO INSURANCE**
: **AGENCY, INC.**

Defendants.

STATE OF NEW YORK)

:ss

COUNTY OF NEW YORK)

STEVEN KENT, being duly sworn, deposes and says:

1. I am a member of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, the attorneys in this action for defendants Avemco Insurance Company and Avemco Insurance Agency, Inc. (together "Avemco"). I submit this affidavit in Support of Avemco's motion to dismiss the complaint pursuant to Federal Rule of Procedure 12(b)(6).

2. The purpose of this affidavit is to describe and formally make part of the record the complaint in this action, which was filed with the Court on or about May 18, 2007 ("Complaint"), together with certain documentary evidence specifically referenced and identified in the Complaint. True and correct copies of same, as identified herein, are annexed as exhibits to this affidavit and are incorporated into Avemco's moving papers.

3. A true, complete and accurate copy of the Complaint, as served upon the moving defendants by service upon the Department of Insurance of the State of New York, on May 25, 2007, is annexed hereto as Exhibit "A".

4. The Complaint refers to a "stop-loss" insurance policy between Avemco and co-defendants Fulton Chevrolet-Cadillac Co., Inc., Fulton Chevrolet Co., Inc., High Point Chevrolet, Inc., and Fulton/High Point Chevrolet Group Health Benefit Program. See, for example, Complaint ¶ 1.

5. The Complaint further alleges, at ¶¶ 24, 25, 32, 33, 34, 35, that the medical care at issue in this action was provided to plaintiff Catherine V. Sirkorski during May, June, July and August 2002.

6. During the time periods set forth in the Complaint, defendant Avemco Insurance Co. issued policy no. AIC5050000856 to "Fulton Chevrolet/High Point Chevrolet", effective April 1, 2002 through March 31, 2003 (the "Policy"). A copy of the Policy is annexed hereto as Exhibit "B".

7. In addition, the Complaint, at ¶¶ 1, 10, 19, 28 and 29, sets forth allegations that the Fulton/High Point Chevrolet Group Health Benefit Program was in effect during the time frame set forth above, until said plan was terminated by the plan sponsor effective July 31, 2002. A copy of the plan submitted by the policy holder to Avemco is annexed hereto as Exhibit "C".


STEVEN KENT

Sworn to before me this
6th day of July, 2007.


NOTARY PUBLIC

MICHELE SAVINI
Notary Public, State of New York
No. 01SA4816512
Qualified in Richmond County
Commission Expires June 30, 2010